became apparent, Respondents' counsel objected and requested the Judge to question Dr. Bennett outside the presence of the jury so the jurors would not hear additional inadmissible testimony. The Judge agreed, excused the jury, and began to question Dr. Bennett regarding his opinion. The Judge explained to the witness that, to be admissible, his opinion must be framed within terms of reasonable medical probability, something Petitioner's counsel should have already done. Dr. Bennett candidly admitted to the court that he could present his opinion only in terms of possibility. Nevertheless, in an act of extreme caution, the Judge allowed Petitioner's counsel to ask any questions she wanted in an attempt to make this opinion evidence admissible. When she failed to do so after extensive questioning, the court ruled that Dr. Bennett's testimony would be excluded[5] [App. 22].

During the Petitioner's testimony on the second day of trial he confirmed what he said in deposition: the competition between the two shifts led to all of his problems with

---

Court of Appeals had nothing to do with the fact that Dr. Bennett's testimony was excluded. The directed verdict was based on a lack of evidence of liability, not a lack of evidence of damages. However, because Petitioner misrepresents this evidentiary issue to this Court, Respondents are compelled to present the true story.

[5] The Petitioner's accusations concerning the events leading to Dr. Bennett's opinion being excluded are far from accurate. Petitioner alleges that the Judge would not allow his counsel to qualify the expert [Petition p. 3, n.1]. In fact, Petitioner's counsel did qualify Dr. Bennett, and defense counsel never objected to his qualifications. The trial court did not exclude his testimony based on his lack of qualifications. As another example, Petitioner asserts that the court did not give his counsel ample time to question Dr. Bennett [*Id.*]. The record confirms the very opposite. The Judge repeatedly inquired of Petitioner's counsel if she had any more questions for the doctor and only after counsel ran out of questions did the Judge exclude his testimony.

Bullock, and this competition was the "sole root" of his problems in the plant. Although he was never able to establish a link between the first assault and the Respondents, in his mind it was this competition – **not his age** – that led to the alleged assault in the plant.

Twice during that morning of the second day of trial, the court candidly and directly inquired of Petitioner's counsel whether she would offer any evidence to establish a link between the assaults and the Respondents and, if so, what that evidence would be. Petitioner's counsel failed to provide any explanation as to how these assaults were connected to the Respondents. In fact, in his Petition to this Court, Petitioner still makes no logical connection.

Immediately after the lunch break on the second day of trial, the trial court directed Petitioner's counsel to present as her next witness someone – *anyone* – who would connect the assaults to the Respondents. After Petitioner's testimony concluded, his counsel told the court she needed to call Lloyd Bradley as her next witness because of his respiratory problems. When the court asked counsel whether Mr. Bradley could make a connection between the assaults and the Respondents, **she admitted he could not.**[6] The trial court denied the request to call Mr. Bradley and reiterated the order for Petitioner to present a witness who could connect the assaults to the Respondents.

Bob Brown was the next witness called. He too presented no testimony to link any of these specific

---

[6] Petitioner misrepresents the record to now say that his counsel "never admitted" to the trial court that Mr. Bradley could make the connection between the assailants and the Respondents [Petition p. 5].

Respondents to the assaults. Following Mr. Brown's testimony, the court **again** asked Petitioner's counsel what evidence she would present at trial to link the assaults to the Respondents. She admitted she had none:

> Judge Gill: . . . [I]f it's all true, how does [Plaintiff's evidence] connect these three assaults with these three defendants? If it's all true, tell me just in plain English.
>
> Ms. Roberts: Because it all goes back to Doug Bullock.
>
> Judge Gill: What do you mean it all goes back to Doug Bullock? What is the testimony going to be that's going to connect these three defendants with these three assaults?
>
> Ms. Roberts: The first one, they had an obligation not to let that happen on company property. The second and third incidences occurred at his home, . . . **and I do not have that connection as far as to whether [Bullock] hired these persons or not. I don't have that.** I have circumstantial evidence that indicates they were all three the same person.

Accordingly, the trial court entered a directed verdict dismissing Petitioner's claims. The Judge explained the basis for his decision at length at trial, in his written judgment, and again when denying Petitioner's post-trial motion. The Court of Appeals affirmed in an equally comprehensive, albeit unpublished, Opinion with all Judges concurring in the result. The Kentucky Supreme Court denied Petitioner's Motion for Discretionary Review, thereby making three separate levels of Kentucky courts that have considered and rejected Petitioner's cause.

Undaunted, Petitioner now brings his unsupported state law claims to the United States Supreme Court.

REASONS FOR DENYING THE WRIT

Review by this Court is inappropriate on two very basic levels. First, this Court lacks the jurisdiction to review evidentiary and dispositive rulings of a state trial court in a matter grounded entirely on state law. 28 U.S.C. §1257. There are absolutely no "compelling reasons" that would justify a writ of certiorari. SUP. CT. R. 10. Second, the Kentucky courts were entirely correct. The trial court was correct to direct a verdict where there was no evidence to connect the Respondents to any of the claimed wrongdoings. The Kentucky Court of Appeals was correct to affirm the decision and the state's Supreme Court was correct to deny discretionary review under a standard requiring "special reasons" for yet a third level of review.

Petitioner believes he is entitled to a trial with no proof, and a review by the United States Supreme Court with no compelling reasons. We disagree and respectfully request that his Petition be denied.

I. THE PETITION FAILS THE BASIC THRESHOLD FOR REVIEW.

There is no disguising the fact that Petitioner comes to this Court solely to complain of perceived error by the Kentucky Court of Appeals, and every other Kentucky court that reviewed his case. But as this Court is forced to remind from time to time: "It is beyond dispute that we do not hold a supervisory power over the courts of the several States." *Dickerson v. United States*, 530 U.S. 428, 438

(2000).[7] Likewise, the Court has long held that it "do[es] not grant a certiorari to review evidence and discuss particular facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The Petition here clearly is devoted exclusively to Petitioner's view of the evidence and facts in his case.

When state court proceedings are at issue, this Court's "authority is limited to enforcing the commands of the United States Constitution." *Dickerson*, 530 U.S. at 438. There are no constitutional issues in this case and Petitioner cannot make it otherwise by simply citing to the Constitution in his Jurisdiction Statement and tacking on the phrase "due process" every time he says "clear error." He makes no attempt to articulate or to support his "due process" references. That notwithstanding, he has waived any due process argument by not raising it below. This Court has no power to consider a federal issue that was not presented to the state courts hearing the case. *Street v. New York*, 394 U.S. 576, 581-582 (1969). Petitioner "argues" due process for the first time in his Petition to this Court. He is simply too late with an otherwise unsupportable argument.

The foregoing fatal jurisdictional deficiencies notwithstanding, Petitioner also fails to present any "compelling reasons" for this High Court's review of his state age discrimination case. First, the Kentucky Court of Appeals did not decide an important federal question, which is a prerequisite for the type of reason the Court considers compelling under SUP. CT. R. 10. Second, there is no

---

[7] Citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension").

conceivable conflict with another state court or any federal court since all the questions at issue were brought and decided exclusively under Kentucky law. Petitioner says that the Kentucky courts' decisions conflict with *Reeves v. Sanderson Plumbing Products, Inc.*, 550 U.S. 133, 141 (2000) [Petition p. 1]. *Reeves* is a federal case involving application of the federal age discrimination statute and is not controlling for Kentucky courts applying KRS 344. Any alleged conflict with *Reeves* is therefore irrelevant.[8]

In short, Petitioner asks this Court to correct errors by the Kentucky Court of Appeals, which is not the function of the United States Supreme Court. Even if this Court were inclined and empowered to oversee all evidentiary rulings and directed verdicts rendered by the courts of the 50 states, there would still be no basis for review here because this state court was absolutely correct.

II. THE KENTUCKY COURTS WERE CORRECT.

A. The Inadmissible Hearsay Was Properly Excluded.

As Petitioner readily admits, and the Court of Appeals properly recognized, the linchpin to all his claims in this case is Respondent Bullock's alleged role in the liquid

[8] The fact is, the Kentucky Court of Appeals never reached the issue of whether Petitioner was discriminated against based on age because, as Petitioner's counsel admitted to the trial court, there was no admissible evidence to establish a causal link between the alleged assault and these Respondents. Petitioner's utter lack of causation evidence was fatal to his age discrimination claim. The Court of Appeals properly affirmed a directed verdict under Kentucky law that allows such during the course of a trial when it is clear a party cannot recover. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770 (Ky. 2000).

assaults: the first one allegedly occurring the day before Petitioner's August 1999 retirement and the other two some 16 and 19 months after he filed his August 2000 Complaint. From that Petitioner sought to hold all the various Respondents responsible under KRS 344, vicarious liability and common-law negligence theories for failing to prevent the liquid assaults.

Petitioner admits that Bullock did not commit the assaults himself. In fact, throughout the trial, Petitioner had no idea who his alleged assailants were but believed they were Bullock's "henchmen" because *he says they said* the following during his alleged assaults: "Go tell Dougie, we have got him"; "Mr. Estes, Doug Bullock has sent you a Christmas present"; and "you know the drill." Petitioner conceded below that these statements are hearsay but, no doubt recognizing that without the statements he had no evidence implicating Bullock, Petitioner argued that exceptions apply.

The Court of Appeals likewise recognized the importance of the hearsay statements to the survivability of Petitioner's cause and devoted 17 pages of factual and legal analysis to the issue. The Court's discussion is thoughtful and well-supported in law. It need not be repeated here. In the end, the Court concluded that the trial court properly excluded as hearsay the "Christmas present" statement and the "Go tell Dougie" assertion in "Go tell Dougie, we have got him" [App. 11, 18-19]. The Court found it was harmless error to exclude the "we have got him" and "you know the drill" assertions because even if admitted, those utterances in no way linked Bullock to the assaults, which was required to avoid directed verdict [App. 12, 17].

In his Petition, Petitioner glosses over the hearsay rulings and certainly offers no law to refute the Court of Appeals's lengthy analysis of the evidentiary issue. Instead, the bulk of the Petition is devoted to a shotgun presentation of irrelevant and sometimes incomprehensible snippets of testimony from 50-odd proposed witnesses he might have presented at trial. The trial court called the tactic a "filibuster" and the Court of Appeals felt "barraged" with endless immaterial facts; both correctly observed that none of the proposed testimony connected the alleged assaults to these Respondents. Further, Petitioner conveniently forgets in his zest to concoct a case for this Court that at trial his counsel admitted – finally – when questioned by the trial court that she had no testimony connecting the Respondents to the assailants: "I do not have that connection as far as to whether [Bullock] hired these persons or not. I don't have that."

B. Petitioner's Claims Were Unsupported.

The Court of Appeals correctly upheld the trial court's conclusion that with no evidence linking Respondents – Bullock in particular – to the liquid attacks, Petitioner's assault-related claims were unsupportable.[9] The Court was also correct in agreeing with the trial court that Petitioner failed to establish a prima facie showing of age discrimination against these same Respondents [App. 20]. An adverse employment action is

---

[9] As to the various and sundry other claims proposed by Petitioner, the Court of Appeals affirmed that any of his theories of liability against his former employer and its agents based upon negligence are barred by the exclusivity provision of the Kentucky Workers' Compensation Act [App. 19].

essential to a discrimination claim under KRS 344.040. And, it was Petitioner himself who listed "assault on the job" as the adverse action in his Brief to the Court of Appeals. Accordingly, when Petitioner failed to show some connection between the assaults and the Respondents, he had no age discrimination claim as a matter of law.[10]

C. Directed Verdict Was Appropriate Under Kentucky Law.

This case should have never gone to trial. It proceeded only upon the trial court's overly restrictive view of the summary judgment standard and the quite disingenuous assurances by Petitioner's counsel that she would be producing evidence to establish her client's cause of action. Petitioner voices extreme indignation over the court ending the trial before counsel could parade Petitioner's 50-odd immaterial witnesses in front of the jury. The fact is, the trial court did not end this trial; Petitioner's counsel did, when she finally and for the first time candidly admitted she had no case – with or without her witnesses.

The trial court was "fully aware" that it is an unusual move to direct a defense verdict before the close of Petitioner's proof [App. 26]. But the Kentucky Court of Appeals has affirmed recently the inherent power of a trial court to decide a case as early as opening statements when counsel clearly and definitely discloses no cause of action. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 774 (Ky. App. 2000); *accord Co-De Coal Co. v. Combs*, 325 S.W.2d 78, 79 (Ky. 1959) and *Raco Corp. v. Edwards*, 272 S.W.2d 345, 347 (Ky. 1954). Further,

---

[10] In fact, Petitioner's alleged facts could not support any theory of liability for age discrimination because they have nothing to do with age.

> It may be inferred from these cases that if, at a later point in the trial, the evidence clearly and definitely discloses no cause of action, then the trial court may likewise direct a verdict.

Lambert, 37 S.W.3d at 774-75.

All the courts in this case, the trial court in particular, recognize that the power to end a trial before completion of a plaintiff's case-in-chief should be exercised with caution. *Id.* The record in this case, both before and during trial, is virtually overcome with caution. Aside from the two previously discussed undisputable rulings regarding Petitioner's negligence claims and his proffered hearsay evidence, the trial court allowed Petitioner the widest latitude to develop some kind of cause of action. Time and time again the court warned both Petitioner and Petitioner's counsel that they must come forward with some competent evidence linking the Respondents to the assaults that form the bases for all Petitioner's claims. At trial, the court practically begged Petitioner to show it some probative evidence.[11] He never could because, as his counsel admitted, it simply was not there.

---

[11] Kentucky long ago abolished what was known as the "scintilla rule," which in substance held that **any** evidence supporting the plaintiff's cause of action required submission to the jury. *See Wadkins v. Chesapeake & Ohio Ry Co.*, 298 S.W.2d 7, 9 (Ky. 1957); *Nugent v. Nugent's Ex'r*, 281 Ky. 263, 135 S.W.2d 877, 883 (1940). Since the *Nugent* opinion was issued in 1940, **the Kentucky Supreme Court has steadfastly required plaintiffs to present substantial evidence of probative value to the trial court in order to survive directed verdict.** *See, e.g., Burnett v. Ahlers*, 483 S.W.2d 153, 157-58 (Ky. 1972); *Perry v. Ernest R. Hamilton Assocs., Inc.*, 485 S.W.2d 505, 508 (Ky. 1972); *Wiser Oil Co. v. Conley*, 380 S.W.2d 217, 219 (Ky. 1964); *Wadkins*, 298 S.W.2d at 9.

The trial court correctly applied Kentucky law and exercised its inherent power to direct a verdict early in Petitioner's proof when there was in essence no proof at all. The Kentucky Court of Appeals likewise correctly affirmed, and the Kentucky Supreme Court correctly denied review.

CONCLUSION

There are absolutely no reasons, "compelling" or otherwise, for this state court case to be heard by the United States Supreme Court. Certainly the Petition raises none. Petitioner was afforded every opportunity to present a case, but he had none. Both the trial court and the Court of Appeals rendered comprehensive and fully supported decisions based on principles of established Kentucky law. No federal law or constitutional rights are implicated in the least. The time has long passed to put this matter to rest. Petitioners respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DEBORAH H. PATTERSON
Counsel of Record
RANIA BASHA
WYATT, TARRANT & COMBS, LLP
2800 PNC Plaza
500 W. Jefferson St.
Louisville, Kentucky 40202
(502) 589-5235
Counsel for Respondents
Carpenter Company,
Jim Guthrie, Johnny Meguiar,
and Doug Bullock

RENDERED: November 19, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000090-MR
AND
NO. 2003-CA-000190-MR

COREN ESTES — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL
FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
CIVIL ACTION NO. 00-CI-00341

CARPENTER COMPANY;
JIM GUTHRIE;
JOHNNY MEGUIAR;[1]
AND DOUG BULLOCK,

APPELLEES/CROSS-APPELLANTS

OPINION
1. AFFIRMING DIRECT APPEAL NO. 2003-CA-000090-MR
2. DISMISSING CROSS-APPEAL
NO. 2003-CA-000190-MR AS MOOT

* * *

BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER, JUDGES.

MINTON, JUDGE: Coren Estes appeals following a directed verdict entered in favor of his former employer, Carpenter Company ("Carpenter"), as well as Jim Guthrie, Johnny Meguiar, and Doug Bullock (collectively "the

[1] Johnny Meguiar's name is misspelled as "McGuire" throughout the record.

appellees"). Estes was the victim of a series of bizarre assaults which he alleges were orchestrated by Bullock, another employee of Carpenter. Bullock's alleged involvement served as the basis for several theories of liability against Carpenter and its managers, Guthrie and Meguiar. The circuit court directed a verdict in favor of the appellees when it became convinced after two days of trial that there was no evidence connecting Bullock and the assaults. We are similarly convinced. So we affirm the dismissal.

THE SERIES OF ASSAULTS

Estes alleges that on three occasions, he was accosted[2] by one or two masked individuals[3] who brandished a gun and forced him to drink a liquid containing doxylamine[4] which caused him to lose consciousness. The first assault happened on Carpenter's premises on August 11, 1999, the day before Estes was to retire. The second and third assaults occurred after Estes's retirement on December 19, 2001, and March 18, 2002, at his home. Estes alleges that Bullock was somehow behind the assaults. He then builds upon that to allege liability on the part of Carpenter, based

---

[2] There was some dispute before trial about whether these assaults actually occurred. Our resolution of the issues on appeal assumes that these assaults did occur as Estes describes them, so this factual question is irrelevant for our purposes.

[3] Estes says there was one common assailant involved in all three assaults. There was also a second assailant who participated only in the first assault.

[4] Doxylamine is an antihistamine which causes drowsiness. It is used by itself as a sleep aid (under the brand name Unisom) or in combination with decongestants to treat cold symptoms.

on theories of age discrimination, negligence, and *respondeat superior.*

THE EVIDENCE PROFFERED BY ESTES

The only evidence Estes proffered to connect Bullock to the assaults is three utterances[5] of the unknown assailants.[6] Estes says that during the first assault, he heard one assailant say to the other, "Go tell Dougie we have got him." Estes says that during the second assault, the assailant said, "Mr. Estes, Doug Bullock has sent you a Christmas present." During the third assault, the assailant said, "You know the drill." The admissibility of these specific utterances was challenged before trial in the appellees' motion *in limine.* It was discussed at length in a pretrial hearing, and Estes filed a memorandum citing reasons in support of admitting these utterances into evidence at trial. Ultimately, the circuit court ordered that these utterances be excluded from trial on the grounds that they are hearsay not falling within any applicable exceptions. Because this specific evidentiary issue was

[5] We use the somewhat awkward term "utterances" rather than "statements" because "statement" is a term of art within the meaning of the Kentucky Rules of Evidence (KRE) regarding hearsay. *See* KRE 801(a). Whether these utterances are statements is an issue before this court.

[6] On appeal, Estes has barraged this Court with endless facts which are offered ostensibly to connect the assaults with Bullock. For example, the assailant wore the same jacket in two of the assaults, and a late 1970's to early 1980's model Chevrolet pickup was seen in front of Estes's house prior to the second and third assaults. While this type of evidence is relevant to showing a common assailant, none of it in any way implicates Bullock.

fairly brought to the attention of the circuit court before trial, we find that it is preserved for appellate review.[7]

THE DIRECTED VERDICT BEFORE ESTES CLOSED HIS CASE

Estes asserts that the circuit court erred by excluding these three utterances which he believes ultimately led the circuit court to grant a directed verdict in error. The circuit court granted a directed verdict in the appellees' favor after two days of trial but before the end of Estes's proof. After the second day of trial, the circuit court called the lawyers to the bench for a conference. Noting that none of Estes's evidence presented thus far had connected the assaults to Bullock, the circuit court asked Estes's counsel if she believed, in good faith, that any of the remaining witnesses[8] could do so. Perceiving her answer in the negative, the circuit court entered a directed verdict in the appellees' favor. While it is unusual for a court to direct a verdict prior to the close of a party's evidence, a court may do so in the unique situation where "the evidence clearly and definitely discloses no cause of action."[9] Even if a court were to grant a directed verdict prematurely, the court's judgment may not be set aside if its ruling was harmless error.[10]

---

[7] Kentucky Rules of Evidence (KRE) 103; Tucker v. Commonwealth, Ky., 916 S.W.2d 181, 183 (1996).

[8] Estes had listed approximately fifty witnesses on his witness list.

[9] Lambert v. Franklin Real Estate Co., Ky.App., 37 S.W.3d 770, 774-775 (2000).

[10] *Id.* at 775.

An appellate court reviewing a grant of a directed verdict must consider the evidence and all reasonable inferences and deductions drawn from the evidence which support the claim of the prevailing party.[11] After the trial court has heard evidence on an issue squarely presented before it and has made its decision, the reviewing court cannot substitute its judgment for that of the trial court unless the trial court's decision was clearly erroneous.[12]

DISCUSSION OF ESTES'S PROFFERD EVIDENCE

On appeal, Estes concedes that the utterances are hearsay but asserts that the trial court erred by not admitting them under KRE 804(3)[13] as statements against declarant's interest. The definition of hearsay is familiar: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[14] However, less attention is paid to the fact that "statement" is further defined as "(1) An oral or written assertion; or (2) Nonverbal conduct of a person, if it is intended by the person as an assertion."[15] KRE 801 closely parallels Rule 801 of the

---

[11] Meyers v. Chapman Printing Co., Ky., 840 S.W.2d 814, 821 (1992).

[12] Davis v. Graviss, Ky., 672 S.W.2d 928, 933 (1984).

[13] Before trial, Estes also raised two other theories regarding why the utterances are admissible. He asserted that they are not hearsay because they are not offered for their truth but, rather, for their significance as verbal acts or to show his state of mind at the time of the assaults. Estes subsequently abandoned these arguments.

[14] KRE 801(c).

[15] KRE 801(a).

Federal Rules of Evidence.[16] The Advisory Committee Note on FRE 801(a) explains the importance of intent as follows: "The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one."[17] The Kentucky Supreme Court has also recognized that the focus under KRE 801(a) is on the intent of the speaker or actor.[18] With this definition in mind, we will examine each of the three utterances to see if it meets the definition of hearsay[19] and, if so, whether it falls within the hearsay exception for statements against the declarant's interest. In the interest of convenience, we will not limit ourselves to addressing each in the chronological order in which it was made.

"MR. ESTES, DOUG BULLOCK HAS SENT YOU A CHRISTMAS PRESENT."

Estes asserts that during the second assault, which occurred shortly before Christmas, the assailant said, "Mr. Estes, Doug Bullock has sent you a Christmas present."

---

[16] Fed. Rules Evid. (FRE) 801(a)-801(c) and KRE 801(a)-801(c) are substantively identical, containing only subtle differences in punctuation and capitalization.

[17] Fed.R.Evid. 801, Advisory Committee Note to subdivision (a) (1973).

[18] ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.05[5] at 569-570 (4th ed. 2003) (*citing as an example,* Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996)). All references to Lawson refer to the fourth edition of THE KENTUCKY EVIDENCE LAW HANDBOOK unless otherwise indicated.

[19] Because there is no question that all three utterances were made out of court, we need not address that part of the definition.

The "Christmas present" referred to was the liquid containing doxylamine which Estes was then forced to drink. This utterance is a statement within the meaning of KRE 801(a) because the declarant[20] is asserting as a matter of fact that Doug Bullock has sent Estes the liquid containing doxylamine. The fact that the phrase "Christmas present" is sarcastically metaphorical, rather than literal, does not alter the assertive nature of the utterance since its meaning is easily discernible.[21] The admissibility of this out-of-court statement depends on the purpose for which it is offered. Estes sought to introduce this statement to show that Bullock sent the assailant to his door with the drug (and presumably the orders to forcibly administer the drug). This is the truth of the matter asserted, the very use of hearsay which is forbidden.[22]

Estes asserts that this statement falls under the hearsay exception KRE 804(b)(3) as a statement against declarant's penal interest. In its order ruling on the motion *in limine* to exclude all three utterances, the circuit court employed the following analysis of KRE 804(b)(3), which we adopt, at least with respect to the statement, "Mr. Estes, Doug Bullock has sent you a Christmas present":

> Under this exception two requirements must be met. The first is meant to establish the necessity

---

[20] Just as using the term "statement" presupposes that the utterance in question is intended to make an assertion, using the term "declarant" presupposes that the speaker in question is making a statement. *See* KRE 801(a), (b). Therefore, we will use the generic term "speaker" where there is a question about whether the utterance is a statement.

[21] JOHN W. STRONG, MCCORMICK ON EVIDENCE § 250, at 112 n.29 (5th ed. 1999).

[22] *See* KRE 801, 802.

of the proffered testimony and the second is to establish its trustworthiness.

Under this rule the declarant must be:

1) "unavailable" as a witness as defined by KRE 804(a). Under this rule, "unavailability as a witness" includes the situation in which the declarant [the only possible applicable subsection is KRE 804(a)(5)]: "is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means."

AND,

2) the statement must be:

"A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." KRE 804(b)(3).

Can someone whose identity is absolutely unknown be declared "unavailable" as a witness? If [he] can, can the statements attributable to the anonymous person, made while he was in the process of committing a crime, be admitted under the second requirement?

Although highly dubious, the answer to the first question is, arguably, yes. Cases interpreting this requirement seem to turn on the good faith of the proponent in attempting to secure the attendance of the witness.[23] At this point in the proceedings, the Court has no reason to question [Estes's] good faith in his allegations concerning the assailants or his efforts to ascertain their identity or obtain their testimony for trial.

The theory of the second requirement is that people don't usually make false statements which put them in jeopardy civilly or criminally. When people make personally incriminating statements, the theory goes that the statements are more likely to be true.

In this case the statements do not put the unknown assailant in any additional jeopardy. He is in the process of committing a crime. Statements tending to show who may have employed him or may be a co-conspirator add little or nothing to his potential jeopardy. The fact that the identity of the declarant(s) remains anonymous and that two statements were made pointing to "Dougie" during separate assaults detracts from the trustworthiness of all of the statements.

---

[23] *See, e.g.*, ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.45 IV (3rd ed. 1993) (citation format altered from parenthetical citation in original).

> Assuming that the facts are precisely as stated by [Estes], why should anyone believe that the statements of the anonymous assailants are true? What are their indicia of reliability? There are no corroborating circumstances clearly indicating the trustworthiness of the statements. The Court concludes that this hearsay exception is inapplicable.

On appeal, Estes points to the deposition of Willis Shores as providing the corroborating circumstances required by KRE 804(b)(3). Shores stated that he was on the telephone with Estes during the second attack when he heard someone ring Estes's doorbell and say, "Mr. Estes" and "sent you a Christmas present." This was followed by shuffling noises, Estes saying loudly, "Get out of here," and finally a dial tone. Shores's testimony does not supply the corroborating circumstances required for a statement against penal interest. The similar requirement of "corroborating circumstances [that] clearly indicate the trustworthiness of the statement" for the admissibility of hearsay statements against penal interest[24] under FRE 804(b)(3) has generally been interpreted to require corroboration of the truthfulness of the declarant's statement rather than the veracity of the witness relaying the statement.[25] We hold that this is also the appropriate

---

[24] Unlike KRE 804(b)(3), FRE 804(b)(3) requires corroborating circumstances only where the statement tending to expose the declarant to criminal liability is offered to exculpate the accused.

[25] *See* United States v. Seely, 892 F.2d 1, 2-3 (1st Cir. 1989); United States v. Brainard, 690 F.2d 1117, 1124-1125 (4th Cir. 1982); and United States v. Katsougrakis, 715 F.2d 769, 775 (2d Cir. 1983). *See also* Massachusetts v. Drew, 489 N.E.2d 1233, 1240-1241 (Mass. 1986) (applying Massachusetts common law which adopted the principles of FRE 804(b)(3).

interpretation of KRE 804(b)(3). "As a matter of standard hearsay analysis, the credibility of the in-court witness regarding the fact that the statement was made is not an appropriate inquiry."[26] This is because the witness relaying the declarant's statement is available for cross-examination, which will presumably reveal any lack of credibility, memory, or perception on the part of the witness,[27] while the declarant is not available for cross-examination.[28] At most, Shores can corroborate that Estes accurately reported what the declarant said. But Shores's testimony offers no support for the truthfulness of the declarant's statement, which is what is required under KRE 804(b)(3). Thus, we affirm the circuit court's ruling that this hearsay statement cannot be admitted as a statement against penal interest because it lacks the required corroboration.[29]

"YOU KNOW THE DRILL."

Estes alleges that during the third assault, the assailant told him, "You know the drill." This meets the first requirement of hearsay; it is a statement within the meaning of KRE 801(a) because it is an oral assertion. If this statement were to be offered for its truth – to show

---

[26] McCormick on Evidence § 319 at 328.

[27] *Id.* n.28.

[28] As noted, KRE 804(b)(3) only applies if the declarant is unavailable, as defined by KRE 804(a).

[29] Estes does not challenge the circuit court's conclusion that the assailant's statement also fails the first component of the test for admissibility as a statement against interest in that it does not expose the assailant to any additional jeopardy. Therefore, we affirm on this basis, as well.

that Estes was familiar with the routine of the assaults – it would be inadmissible. However, Estes sought to offer this statement as circumstantial evidence showing a common assailant based on the assailant's knowledge that Estes had been assaulted in a similar fashion on previous occasions. This is a non-hearsay use. Therefore, we find that the circuit court erred in deeming the statement, "You know the drill," as hearsay and, consequently, excluding it. Because it is not hearsay, it is presumptively admissible. However, the directed verdict was entered against Estes because he could not link the assaults in any way to Bullock. Merely being able to show a common assailant in all three assaults would not help Estes establish this connection. Therefore, we find that the exclusion of the statement, "You know the drill," to be harmless error.

"GO TELL DOUGIE WE HAVE GOT HIM."

Estes asserts that during the first assault, one assailant said to the other, "Go tell Dougie we have got him." This utterance is a command, an ins uction. Some treatises assert that commands, like questions, cannot be statements within the meaning of FRE 801(a), or presumably KRE 801(a), because they make no assertion of fact or opinion.[30] But this categorical approach has been rejected by many courts and legal scholars as artificial and unduly formalistic.[31] We also find th approach

[30] *See, e.g.*, DAVID F. BINDER, HEARSAY HANDBOOK § 2.02 at 18-19 (3d ed. 1991). *But see* Wisconsin v. Kutz, 671 N.W.2d 660, 676 (Wis. Ct. App. 2003) (noting that cases relied upon for these treatises often do not entirely rule out the possibility of an assertive directive or question).

[31] MCCORMICK ON EVIDENCE § 250 at 112 n.29; Kutz, 671 N.W.2d at 564-566.

inconsistent with the focus placed on the intent of the speaker under KRE 801(a). It is illogical to make the grammatical form of an utterance – whether it is a declarative sentence, command/instruction, or question – dispositive in determining whether the speaker intended to make an assertion within the meaning of KRE 801(a).[32]

Any assertion contained in the command, "Go tell Dougie we have got him," is necessarily indirect or implicit. The Kentucky courts have not specifically addressed whether "assertion" in the definition of "statement" in KRE 801(a) is broad enough to include an implicit assertion.[33] As previously noted, intent is the touchstone for whether an utterance is a statement within the meaning of KRE 801(a). Can one intend to assert a matter of fact or opinion indirectly or implicitly? Some courts considering this issue have merely assumed that a so-called implicit assertion cannot be an intentional assertion and, thus,

---

[32] *See* Kutz, 671 N.W.2d at 677-678.

[33] By using the term "implicit assertion," we seek to distinguish this matter from the common law concept of "implied assertion." Under the common law, some courts treated the inferences drawn from nonverbal conduct, which the actor did not necessarily intend to be assertive, as hearsay, relying on the action's so-called "implied assertion." The consensus among most legal scholars is that an inference arising from such nonassertive, nonverbal conduct is no longer treated as hearsay under the modern rules of evidence but, rather, as circumstantial evidence of a fact in issue. BINDER, § 2.05, MCCORMICK ON EVIDENCE, § 250 at 111-113. *But see*, Wheeler v. Commonwealth, Ky., 121 S.W.3d 173, 183 (2003) (assuming, without any analysis of the eyewitness's intent, that a police officer's reference to an eyewitness's lack of hesitation in identifying the defendant's photograph in a photo pack is hearsay because of the implied assertion that the eyewitness was positive of the identification). Because this case does not involve nonassertive, nonverbal conduct, the law on "implied assertion" has no bearing.

cannot be a hearsay statement.[34] However, we join the majority of state courts,[35] as well as the United States Court of Appeals, Sixth Circuit,[36] in rejecting this proposition. We reject this too-narrow definition of "assertion." Its plain meaning encompasses more than merely communicating through simple, declarative sentences. One who states, "It will stop raining in an hour," asserts, or intentionally communicates, the message that it is raining now as clearly as if that person had said, "It is raining now, but it will stop in an hour."[37] Thus, it would be absurd to treat only the latter and not the former statement as hearsay when offered to prove the truth that it is raining now.

This leads to the following questions: how to determine whether a speaker intends to make an implicit assertion and, if so, how to determine what that implicit assertion is. In answering these questions, the Michigan Court of Appeals[38] found guidance in the following framework, suggested by the Advisory Committee Note on FRE 801(a) on how to determine whether nonverbal conduct is intended as an assertion:

---

[34] *E.g.*, United States v. Zenni, 492 F.Supp. 464, 469 (E.D. Ky. 1980); United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990).

[35] *See* Kutz, 671 N.W.2d at 678 n.21 (listing various state positions on this issue). The Kutz case in general presents a scholarly, thorough, and well-written analysis on the issue of implicit verbal assertions, ultimately holding that implicit verbal assertions may be hearsay statements under Wisconsin's evidentiary rules. *Id.* at 673-681.

[36] Lyle v. Koehler, 720 F.2d 426, 432-435 (1983).

[37] McCORMICK ON EVIDENCE, § 250 at 111-112 n.29 (noting that the utterance, "it will stop raining in an hour," is hearsay when it is offered to prove that it is raining because, "the fact to be proved is a necessary implication of the utterance.") *See also* Tennessee v. Land, 34 S.W.3d 516, 526 n.5 (Tenn. Crim. App. 2000).

[38] Kutz, 671 N.W.2d at 679-680.

> When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact.

We agree with the Wisconsin court that this framework also addressed the appropriate way to determine whether an utterance contains an implicit statement. Moreover, it is consistent with the approach that the Kentucky Supreme Court has already taken with respect to nonverbal conduct.[39] For example, in the case of Partin v. Commonwealth,[40] the Kentucky Supreme Court seemed to place the burden of trying to prove that nonverbal conduct contained an implicit assertion on the party seeking to have the nonverbal conduct deemed a hearsay statement and, hence, presumptively inadmissible.[41] We think that the burden lies with the party claiming that an utterance contains an implicit assertion to show that the speaker intended to and did make a particular expression of fact,

---

[39] LAWSON § 8.05[5] at 570.

[40] Ky., 918 S.W.2d 219, 221-222 (1996).

[41] The evidence at issue concerned a witness's testimony, based on personal observation that the victim acted afraid of the defendant, which was offered to show that the victim feared the defendant. The defendant sought to exclude this on the grounds that it was the equivalent of letting the witness testify that the victim had said, "I am afraid of the defendant." The court rejected the defendant's argument because there was no evidence that the victim intended to make such an assertion through her actions. *Id.*

opinion, or condition.[42] This is consistent with the policy embodied in the Kentucky Rules of Evidence "to tilt the law toward admission over exclusion."[43] The trial court should then determine the admissibility of the utterance containing the alleged implicit assertion.[44] Sometimes it will be clear from the utterance itself that the speaker must have intended an implicit assertion.[45] For example, the implicit assertion in "Joe, why did you steal that car?" is apparent. But "when evidence of surrounding circumstances is needed to resolve the issue, the party claiming an implicit assertion must present that evidence to the trial court."[46]

An example of a situation in which the implicit message within an utterance is only revealed by evidence of surrounding circumstances is found in the case of Brown v. Virginia.[47] The defendant in this rape case twice asked a police officer at the police station after his arrest, "Does Peggy [the rape victim] know I'm here?"[48] The court held that through these questions the defendant intended to

---

[42] *Id.* at 680. *See also,* United States v. Jackson, 88 F.3d 845, 848 (10th Cir. 1996).

[43] LAWSON § 8.05[5] at 570.

[44] Kutz at 680; Land, 34 S.W.3d at 526 (noting that "[w]hen an utterance is offered on the theory that it is not a statement, and hence, not hearsay, a preliminary determination is required to determine whether an assertion is intended").

[45] *Id.*; Jackson, 88 F.3d at 848.

[46] Kutz at 680, Jackson at 848. *See also* Brown v. Virginia, 487 S.E.2d 248, 251 (Va. Ct. App. 1997) (stating that "the extent to which the question may or may ~~not~~ contain an implied assertion depends on the nature of the question and the circumstances.")

[47] 487 S.E.2d 248.

[48] Brown, 487 S.E.2d at 251.

make the implicit assertions that he and Peggy had a personal relationship.[49] However, the court reached this conclusion, in part, based on the fact that the speaker's defense was that he and the victim were involved in a relationship and had engaged in consensual sex.[50] This was in sharp contrast to the victim's story that the defendant was a stranger who broke into her home and raped her.[51] The court interpreted the defendant's questions as implicitly assertive, in part, because they appeared to be attempts to bolster his defense theory.[52]

We must now consider whether the particular utterance, "Go tell Dougie we have got him," makes an implicit assertion and, if so, what it is. The implicit assertion that "we [the assailants] have got him [Estes]," appears to be an obvious and intentional assertion by the speaker. However, Estes did not seek to offer this statement for its truth, to show that the assailants had control over him. The exclusion of this particular implicit statement as hearsay was erroneous. But because this statement does not assist Estes in establishing the needed link between Bullock and Carpenter, it is harmless error.

Estes asserts that the assailant's reference to "Dougie," as in "Go tell Dougie . . . ," is the equivalent of the assailant stating that "Dougie sent us." The circuit court seems to have accepted this as true. It held that the statement was inadmissible because it was offered for the truth asserted, to show that Doug Bullock was behind the

---

[49] *Id.* at 252.

[50] *Id.* at 250-252.

[51] *Id.* at 250-251, 253.

[52] *Id.* at 252.

attack. The conclusion that this passing reference to Dougie was intended by the speaker to implicitly assert that Bullock was behind the attack is by no means a foregone one. Some courts have held that a speaker's reference to another's name does not ordinarily demonstrate intent on the part of the speaker to identify or introduce that other person.[53] However, we note that the meaning of this particular utterance must be considered in light of all the surrounding circumstances. Estes asserts that the same assailant spoke all three utterances at issue. Given the commonality of the attacks, and the fact that the speaker was allegedly the same in each instance, it is not illogical to examine the other utterances for any light that they may shed on the speaker's intent in referring to "Dougie" in the first assault. During the second assault, the assailant expressly tried to place blame on Bullock, saying, "Mr. Estes, Doug Bullock has sent you a Christmas present." In light of this demonstrated intent to implicate Doug Bullock, it is possible to interpret the same assailant's words in the first assault, "Go tell Dougie we got him," as revealing the same intent. While we might not have reached the same conclusion, under these circumstances, we cannot say that the circuit court's conclusion – that the assailant uttering, "Go tell Dougie we got him," intended to assert that "Dougie [Doug Bullock] sent us" – is clearly erroneous. Given this fact, we find that the circuit court properly excluded this statement as inadmissible

---

[53] *See, e.g.*, Little v. United States, 613 A.2d 880, 882 (D.C. 1992) (holding that defendant who shouted, "No, Marvin," when his co-defendant moved to shoot a security guard did not intend to identify his codefendant as Marvin or make any assertion; thus, the utterance was not a statement for purposes of hearsay and was presumptively admissible). *See also* BINDER § 2.02 at 18-19.

hearsay since Estes sought to offer it for the truth of the matter, as proof that the assailants were sent by Doug Bullock.

Because Estes fails to establish any connection to Bullock, his claims that Carpenter should be liable for Bullock's role in orchestrating the assaults similarly fails. Carpenter cannot be liable for something (here, Bullock's involvement in the assaults) that has no evidence to support it. The liability of the other individual defendants also seems to be premised on Bullock's role in the assaults, so the claims against these defendants similarly fail.

THE REST OF ESTES'S CLAIMS

Our lengthy analysis above has not resolved all of Estes's claims. We must, therefore, separately address his claims regarding Carpenter's own liability, insofar as we can determine what those allegations are despite Estes's briefs. Estes alleges that Carpenter failed to investigate sufficiently the first assault and take corrective action in order to prevent the second and third assaults. The circuit court correctly ruled that to the extent Estes employed any theories of liability based on negligence, for example, negligent hiring of Bullock, negligent supervision of Bullock, and a negligent failure to provide a safe workplace, Estes's avenue of relief is limited to workers' compensation by the exclusive remedy provision of KRS 342.690(1).[54]

---

[54] *See also* Adkins v. R & S Body Co., Ky., 58 S.W.3d 428, 430 (2001); Fireman's Fund Ins. Co. v. Sherman & Fletcher, Ky., 705 S.W.2d 459, 462-464 (1986).

Estes seeks to avoid operation of the exclusive remedy provision by recasting his claim as one alleging prohibited age discrimination.[55] However, contrary to his assertion on appeal, he fails to establish a *prima facie* showing of prohibited discrimination. Estes correctly asserts that according to Reeves v. Sanderson Plumbing Products, Inc.,[56] he is required to show that (1) he is a member of a protected class (here, over age 40); (2) he was otherwise qualified for the position; (3) he received an adverse employment action; and (4) he was replaced by a younger person. But Estes fails in his showing of an adverse employment action. He argues that the assault he suffered at Carpenter satisfies this element. However, in order for the assault to be considered an adverse employment action, more is required than simply that it occurred while he was working. He has to show some connection between the assault and his employer. As explained above, Estes has not demonstrated any such connection. Absent any evidence to connect the assault to Carpenter, it cannot be considered an adverse employment action for the purpose of an age discrimination claim.

DISPOSITION OF ESTES'S APPEAL

The circuit court was correct to direct a verdict in favor of the appellees in this legal quagmire. Its judgment is affirmed.

---

[55] KRS 344.040.

[56] 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Reeves deals with the federal Age Discrimination in Employment Act. However, because there are few cases interpreting KRS 344.040, and the Kentucky statute was modeled after the federal statute, it is appropriate to resort to federal interpretation.

DISPOSITION OF THE CROSS-APPEAL

Our affirmance of the trial court's judgment renders the issues raised on cross-appeal moot. So the cross-appeal is dismissed as such.

VANMETER, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT/ CROSS-APPELLEE:	BRIEFS AND ORAL ARGUMENT FOR APPELLEES/ CROSS-APPELLANTS:
Nancy Oliver Roberts Bowling Green, Kentucky	Douglas W. Becker Deborah H. Patterson Louisville, Kentucky

COMMONWEALTH OF KENTUCKY
SEVENTH JUDICIAL CIRCUIT
LOGAN CIRCUIT COURT
CASE NO. 00-CI-00341

COREN ESTES — PLAINTIFF

VS. JUDGMENT FOR DEFENDANTS

CARPENTER COMPANY, JIM GUTHRIE, JOHNNY MCGUIRE and DOUG BULLOCK — DEFENDANTS

A jury was selected and sworn to try this case on Thursday, October 10, 2002. After opening statements the Plaintiff was called to testify.

Toward the end of the first day counsel for Plaintiff was permitted to interrupt the testimony of the Plaintiff and called Dr. Rick Bennett.

The Plaintiff had intended to utilize the deposition of Dr. Bennett rather than present him live at trial but the Court had ruled on Monday, October 7, that the opinion testimony in the deposition was inadmissible because it was not couched in terms of reasonable medical probability. It was instead to the effect that certain of the Plaintiff's medical symptoms might have or could have been worsened by the three alleged assaults upon the Plaintiff – within reasonable medical probability.

The Court ruled that the Plaintiff could present the Doctor's testimony live at trial provided that his opinions were couched in terms of reasonable medical probability. Unfortunately, his live testimony was substantially the same and he was not permitted to give the proffered testimony. This eliminated the Plaintiff's ability to introduce evidence of most of the damages he was claiming.

The Court had ruled before trial that the Plaintiff could pursue no claim based upon a theory of negligence since this was barred by the Workers Compensation Statute. He was left to pursue only the intentional torts of assault and the statutory civil rights claim of age discrimination.

The direct examination of Coren Estes outlined a history of personal conflict between he and Doug Bullock and outlined three occasions where Coren was assaulted by persons whose identity remains anonymous. He did not contend that any of the Defendants actively participated in the alleged assaults but seemed to believe that they were somehow responsible. Coren's testimony, together with statements made by his counsel, caused the Court to suspect that the basis of the claim that the Defendants were legally responsible for the assaults was based upon a theory of negligence or, in any event, that there may be no evidence available connecting the Defendants with any of the alleged assaults.

Coren Estes asserted that he was assaulted on three occasions. The first occurred in August of 1999, one day prior to his planned retirement, on the premises of his employer, Carpenter Company, and was carried out by two masked men at gunpoint; He was thereafter assaulted in the same manner by one of the same unknown men at his home in December of 2001 and again in April of 2002; On each of the three occasions he was forced to drink a green liquid alleged to contain doxylamine, an antihistamine found in over the counter medications such as Unisom.

He claimed that Carpenter Company by and through Johnny McGuire and Jim Guthrie failed to adequately investigate various instances of harassment against him

and finally that Doug Bullock was intentionally harassing him by leaving letters, an e-mail, an obscene cartoon and other written notes in the workplace.

Coren said that he believed that the harassment by Bullock was initially based on workplace competition but inferred that at some point it was based upon his age. He also said that the failure to investigate his allegations of harassment were based upon his age. The reasons he suspected that these matters were based upon his age were not clear. He was not discharged or demoted and his only substantial damages appear to be medical bills arising from the alleged assaults.

There were no eyewitnesses to the assault which took place during 2nd shift on the premises of Carpenter Company and Mr Estes described how anyone could have entered or left the premises unnoticed.

At the conclusion of his testimony on direct examination, neither he nor his counsel had alluded to any evidence, either direct or circumstantial, that any of the Defendants were in any way directly responsible for the assaults. There was no purported direct or circumstantial evidence to the effect that any of the Defendants or any representative of Carpenter Company had been seen associating with men matching the description of either of the alleged anonymous attackers or that any Defendant had conspired to solicit an assault upon the Plaintiff.

If assumed true in every respect, this Court believes that the evidence presented would, as a matter of law, be insufficient to find legal liability, against any of the Defendants for the intentional tort of assault.

Toward the conclusion of the direct testimony of Coren Estes on the second day of trial, the Court informed Plaintiff's counsel (out of the presence of the jury) that it suspected that there was a complete lack of evidence connecting the Defendants with the alleged assaults and was considering ordering that all of Plaintiff's evidence concerning any connection between the alleged assaults and the Defendants be put on immediately following the cross examination of Coren Estes.

This ruling was considered because the Plaintiff had listed more than 50 witnesses. Presumably, some would be called to testify concerning the assaults, some to prove incidents of harassment by Doug Bullock and reports of harassment made by Coren Estes and others to prove damages resulting from the assaults. It would be senseless to waste days of trial time proving these facts if the Plaintiff lacked any substantial proof on this critical issue. The Court's inherent power to control the order of proof includes the power to direct that proof concerning certain issues be presented before others.

Counsel was warned that the failure to present some proof of a connection between the assailants and the Defendant's would result in a directed verdict on the issue of intentional assault. Plaintiff's counsel was requested to describe any such evidence on the record and was unable to do so. She did say "it's circumstantial" but could not describe the purported evidence other than those facts described above.

At the conclusion of the cross examination, Plaintiff's counsel was again questioned at the bench and still could not describe the other specific evidence connecting the Defendants with the alleged attackers and the Court

ordered that any such evidence be produced immediately following the Plaintiff's testimony and reemphasized that if no such evidence could be produced the Court would direct a verdict.

Counsel for Plaintiff next called a witness named Bob Brown and attempted to establish the character of Defendant, Doug Bullock, for having a bad temper. The Court stopped the testimony and, following additional colloquy at the bench (which again confirmed the inability of Plaintiff to produce any evidence on the issue as ordered), sua sponte directed a verdict in favor of the Defendants dismissing all claims.

The claim concerning age discrimination was dismissed because it too depends upon damages resulting from the assaults. The theory of Plaintiff's counsel is this: had the Defendants not intentionally discriminated against Coren Estes by failing to investigate fully the allegations of harassment, then the assaults and resulting damage would not have occurred. The jury cannot be permitted to speculate. The admitted inability of the Plaintiff to prove who committed the assaults or why is an absolute barrier to winning on this theory.

This Court is fully aware that directed verdicts are usually granted only at the close of the evidence offered by an opposing party. Rule 50.01 recognizes the right of a party to move for a directed verdict at the close of the evidence. However, whenever during the course of a trial it becomes clear that a party cannot prevail on a cause of action, the Court has the inherent power to grant a directed verdict. See, e.g., Lambert v. Franklin Real Estate Company, 37 S.W.3rd 770 (Ky App. 2000). Otherwise, the Court and jury might literally be held hostage for days

while a party puts on evidence irrelevant to the issue requiring the directed verdict. In this case counsel for Plaintiff was apparently engaging in a filibuster with character evidence unrelated to the issue of concern to the Court.

This is a final and appealable Judgment, there being no just reason for delay in entry.

Defendants are awarded their costs.

ENTER: This 15th day of October, 2002.

/s/ Tyler L. Gill
Tyler L. Gill, Judge
Logan Circuit Court

No. 06-850

In The

SUPREME COURT OF THE UNITED STATES

CORENESTES,
Petitioner

v.

CARPENTER COMPANY,
JIM GUTHRIE,
JOHNNY MEGUIAR. and
DOUG BULLOCK
Respondents

On Petition For Writ Of Certiorari
From The Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI
PETITIONER REPLY BRIEF

NANCY OLIVER ROBERTS. P.S.C.
ATTORNEY FOR PETITIONER
NANCY OLIVER ROBERTS LAW
FIRM
1023 KENTUCKY STREET
BOWLING GREEN. KENTUCKY
42101
(270) 842-5900

PETITIONER'S REPLY BRIEF

The Respondents have stated numerous incorrect statements or misstatements of the law to which the Petitioner wishes to reply.

JURISDICTION

The Respondent incorrectly stated that the Petitioner "has never asserted that federal law forms the basis for his age discrimination claim." The Petitioner filed his case under the Kentucky Civil Rights Act, KRS 344; however, the 1964 U.S. Civil Rights Act and the Kentucky Civil Rights Act are so similar that the federal law applies even in Kentucky. Hence, Reeves v. Sanderson Plumbing Products, Inc., 550 U.S. 133, 141, 120 S.Ct. 2097, 3006 (2000) applies to this case and the Petitioner must receive the due process that Reeves provides which is that age discrimination may be proven by circumstantial evidence.

The Petitioner had the burden of proof at the trial for age discrimination, as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) and Texas Department of Community v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981). In the Kentucky case of Ammerman v. Board of Education of Nicholas County, Kentucky, Ky., 30 S.W.3d 793, 797-798 (2000), the court held: "The Kentucky Act is similar to Title VII of the 1964 federal Civil Rights Act and should be interpreted consistently with federal law."

REPLY STATEMENT OF THE CASE

The Petitioner, Coren Estes (hereinafter referred to as Coren)

accurately stated the facts by citing the trial video tape and depositions, which the Respondents have failed to, do. The Petitioner's counsel never stated she had "no evidence to support Petitioner's claims" (Respondents' Brief, p. 2). Instead, the Petitioner clearly stated that Petitioner had circumstantial evidence to prove age discrimination and that the assailant was the same person (10-11-02; 2:59:43).

The Respondent incorrectly states the assaults were "all unwitnessed." (Respondents' Brief, p. 2). Lloyd Bradley discovered Coren to be unresponsive in the fire break room on August 11, 1999, the first assault (Bradley, dep. p. 11-12), but the Court refused to allow him to testify (10-11-02; 2:48:46). Bob Brown testified that Doug Bullock slept on the job and that he was capable of hiring someone to commit the assaults (10-11-02; 2:52:08-2:47:00), but the Trial Court stopped Bob Brown's testimony (10-11-02; 3:05:07). This was the link between the assailants and Bullock, but the Trial Court abused his discretion by stopping Bob Brown from completing his testimony, which was not due process. Willis Shores (Shores, dep. pp. 24-35) was offered to testify to the events of the assault of December 19, 2001, which included Coren's doorbell ringing at 9:52 a.m. (Shores, dep. p. 25), the shuffling and scuffling that he heard over the telephone (Shores, dep. p. 63), and "Mr. Estes, (a muffled sound) has sent you a Christmas present." (Shores, dep. p. 28). The March 18, 2002 assault was witnessed by the test results of the contents of Coren's stomach to be doxylamine (Petitioner's Court of Appeals Brief, Exhibits 4-1 and 2, Toxicology Analysis Reports of

3-6-02 and 7-25-02, respectively), which was also doxylamine on December 19, 2001.

The Petitioner now has tracked down his assailants, but he should not have had to do this to preserve this case. The three statements made by the assailants link the Respondent Doug Bullock to the assailants. Two should be admissible.

The Respondents have incorrectly stated when the restraining order was requested early in discovery (ROA, 196-99). The restraining order was requested after the March 18, 2002 incident, because the undersigned was retained as counsel the following date. This case was filed in 2000 by another attorney seeking other than age discrimination claims.

Of course the Petitioner would "not like Bullock" (Respondents' Brief, p. 4), because he threatened him many times, but that is not the issue of the case, age discrimination is the issue.

The Trial Court applied overly restrictive standards for the direct verdict not summary judgment (Respondents' Brief, p. 4).

The "summary of events" chart (ROA, 773-777) was improperly excluded from the jury. The Petitioner was not allowed to use the summary of events chart except during her opening statement, contrary to Respondents' statement (10-11-02; 1:26:56; Respondents' Brief, p. 6).

The Respondents inaccurately stated that "the Judge allowed Petitioner's counsel to ask any questions she wanted in an attempt to make this opinion evidence admissible." (Respondents' Brief, p. 7).

That is inaccurate because the undersigned was not allowed to qualify the expert without interruption from the Trial Court (10-11-02; 4:42:29). Dr. Rick Bennett failed to testify at trial as he had told the undersigned that he would testify that the doxylamine was the reasonable medical probability of the cause of Coren's premature ventricular contracts. The Respondents' footnote 4 is also inaccurate, because the Respondents stated, "However, because Petitioner misrepresents this evidentiary issue to this Court, Respondents are compelled to present the true story." (Respondents' Brief, p. 7). The Petitioner only stated "some of the medical damages regarding Coren's heart treatment were excluded, which was an abuse of discretion." (Petitioner's Brief, p. 3). The Respondents are **not** presenting the true story to this Court.

The "sole root" (Respondents' Brief, p. 8) Coren's problem was not competition, but an older man, Coren, the night lead man, telling a younger man, the day lead man, what to do as directed by Lloyd Bradley (10-11-2; 11:12:12), the supervisor, which was age discrimination, because Coren complained about his failure to be paid for his lunch hour and that Bullock made threats of death against Coren, but Carpenter Company did not investigate these complaints and stop the death threats or actions.

REASONS FOR GRANTING THE WRIT

There are at least three reasons that the Court should review this case, contrary to the Respondents' Brief. First, the Court has jurisdiction pursuant to 28 U.S.C. § 1257, because the United States Supreme Court may review "where the validity of a . . .statute of the

United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. . ." Second the Kentucky Courts are not correct in their decisions regarding Coren's age discrimination and proof. Third, the United States Supreme Court decision in Reeves must apply to Coren's case.

1. THE COURT HAS JURISDICTION.

The Petitioner has raised the issue of the application of the Reeves case in Motions before the Trial Court and in his Court of Appeals Brief, pages 19 to 25. The United States Supreme Court rendered the opinion in Reeves, which the Petitioner cited to the Court of Appeals as follows:

> The Appellant did meet his burden of proof with Coren's testimony only to establish a *prima facie* case of:
>
> (1) a member of a protected class, since he was over age 40;
>
> (2) he was otherwise qualified for the position of lead man;
>
> (3) he received adverse employment action – assault on the job; and
>
> (4) the defendant hired someone to replace him that was younger.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141, 120 S.Ct. 2097, 3006 (2000).

The Petitioner has cited the record before the Trial Court to prove the points of the *prima facie* that were proven. Coren was not paid for his supper, but Bullock was paid for his lunch (10-11-12:3:50:01), which was another adverse employment action by Carpenter. The Petitioner has consistently argued that age discrimination cases should receive due process by not requiring more proof that the above elements, except for the burden shifting as established in McDonnel v. Douglas. KRS 344 is repugnant to the laws of the United States, Reeves and McDonnell v. Douglas cases, if these United States Supreme Court cases are not followed in Kentucky.

The Petitioner has cited the Burlington Industries Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998) and Faragher v. City of Boca Raton, 524 U.S.775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), which held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor over the employee." Ellerth and Faragher created employer liability for the acts of the employee, while the older Kentucky case of Ellinger v. Phillip Morris, Inc., 984 F. Supp. 1043 (W.D. Ky. 1997) held that the individual (employer) was not liable for the acts as an employee under the Civil Rights statute. It is repugnant to the due process clause for Reeves not to be followed in Logan County, Kentucky.

Coren has never "waived any due process argument by not raising it below." (Respondents' Brief, p. 11). The Petitioner has asked for the due process found in Reeves and McDonnell v. Douglas, since March 19, 2002 (the undersigned's Entry of Appearance, ROA, 193).

Smith v. Phillips, 455 U.S. 209, 221 (1982) is cited by the Respondents that "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." (Respondents' Brief, p. 11, footnote 7). The wrong to Coren Estes is of constitutional dimensions. Coren was assaulted three (3) times, but Carpenter did nothing to prevent it and even destroyed evidence that would have proven the August 11, 1999 assault (Carpenter retained one-half of the doxylamine from the first assault, but threw it away). Where is Coren's due process?

2. THE KENTUCKY COURTS ARE WRONG.

The Petitioner has argued how the Kentucky Courts are wrong in his Motion to Set Aside or Vacate the Trial Court Judgment, in the Court of Appeals Brief, in the Petition for Discretionary Review before the Kentucky Supreme Court, and in the Petition for Writ of Certiorari. Without restating those arguments, the Courts have not included as admissible the statements of "go tell Dougie we have got him" and "you know the drill". The directed verdict would have been avoided, if Coren had been allowed to testify as to these statements the assailant said to him before the jury. These statements by the assailants named Doug Bullock, as the person they reported to; therefore the "proposed testimony connected the alleged assaults to these Respondents." (Respondents' Brief, p. 14).

3. REEVES APPLIES TO KENTUCKY AGE DISCRIMINATION CASES.

The undersigned did not "admit she had no case." (Respondents' Brief, p. 15). The undersigned was arguing the application of the due process found in Reeves. In age discrimination employment cases, the Plaintiff attorney ethically cannot talk to current employees of the employer; therefore, if the Plaintiff/Petitioner is not allowed to present circumstantial evidence, the age discrimination cases would be impossible to prove except in a few rare cases where direct evidence may be available. Reeves is controlling and is applicable to Kentucky Civil Rights statute cases.

The Reeves held:

> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. For purposes of this case, we need not – and could not – resolve all the circumstances in which such factors would entitle an employer to judgment as a matter of law. It suffices to say that, because a *prima facie* case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must

always introduce additional, independent evidence of discrimination.

Reeves, at 148-149.

Reeves also held that the trier of fact can infer the ultimate fact of discrimination from the falsity of the employer's explanation. Id. at 146. "Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" Id. at 147. Here Carpenter, the employer, destroyed the evidence (doxylamine); therefore, Carpenter's explanation for not investigating Coren's complaints is presumed to be false. Due process for Coren would be for the jury to be the trier of fact, not the judge.

WHEREFORE, the Petitioner requests the United States Supreme Court to: Grant the Petition; for Oral Arguments; to remand this case for a due process trial on the issue of age discrimination; and for any and all relief the Court determines the Petitioner is entitled.

This the 12th day of April, 2006.

Respectfully submitted,

Nancy Oliver Roberts

NANCY OLIVER ROBERTS, P.S.C.
Attorney for the Petitioner
Nancy Oliver Roberts Law Firm
1023 Kentucky St.
Bowling Green, Ky. 42101
(270) 842-5900